NO. 47777-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

COPIN SASTRAWIDJAYA
and RIANNE MATHEOS,

Petitioners,

v.

MAUREEN MUGHAL,

Respondent.

BRIEF OF RESPONDENT

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A. INTRODUCTION

This matter involves the production of medical records in a personal injury lawsuit. Plaintiffs have refused to produce medical records, requiring Defendant to seek court assistance to obtain those records. The Court required the production of those records through a release to be used by T-scan in the usual course of production of such medical records. Plaintiffs assert that because of their citizenship and rights under Canadian Constitutional law that they are not required to respond to an American Court Order requiring production of records in a civil lawsuit that they initiated in the state of Washington. Plaintiffs also seek the benefit of American federal law in claiming that their rights under HIPAA would also be violated through the collection of records by a third party provider and that their "First Amendment" rights also have been violated. Plaintiffs also object to the scope of the releases provided for these records. As discussed below, Plaintiffs failed to preserve these issues and they are raised for the first time in this appeal.

Plaintiffs have provided some, but not all of their records in the course of discovery and their conduct also constitutes a waiver of any of those newly asserted constitutional claims under both the Canadian

and United States Constitutions – even should they somehow apply and those newly raised arguments are considered. Plaintiffs seek to prevent further voluntary production, claiming that letters rogatory must be provided as the exclusive method by which to obtain further records that Plaintiffs have decided not to provide. The only preserved error in this matter is the question of whether a Court may order the production of records as opposed to requiring that Defendant obtain these documents through letters rogatory. There is no compelling authority for Plaintiffs' position in this matter that the means for discovery must be solely that chosen by Plaintiffs as opposed to that requested by Defendant and as ordered by the trial court.

B. RESTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Respondent acknowledges Appellants assignments of error, but believes that the assignments of error could be more appropriately formulated as follows:

(1) Assignments of Error

1. Did the trial court err when it required Plaintiffs to sign releases to provide further medical records where they had produced some but not all of their records?

2. Did the trial court err in requiring the production of these records through releases as opposed to requiring an alternate procedure such as requiring letters rogatory in Canada?

3. Does the trial court have authority to order practical resolution of a discovery dispute by order production of records through releases given the nature of the claims made and the issues before the court?

(2) Issues Pertaining to Assignments of Error

Respondent acknowledge Appellants' assignments of error and designate the following issues for consideration:

1. Can the Appellants contend that they are entitled to a Canadian privilege (which was not raised and, furthermore, not explained in their brief) against disclosure of documents where, as here they have made claims for their injuries in an American court and they provided some, but not all documents requested?

2. Can the Appellants even claim both rights under Canadian and federal HIPAA as well as U.S. Constitutional rights (First Amendment) particularly where those issues are raised for the first time on appeal?

3. Do Canadian claims of privilege – or even any claim of privilege apply – where, as here, Appellants have made a personal injury claim seeking damages for medical expenses and Appellants have produced some, but not all of their medical records?

4. Have the Appellants waived any asserted rights under Canadian law or HIPAA (to the extent cognizable) by already producing medical records, albeit records they chose to produce?

5. Should Appellants' claims with respect to the Canadian Constitution, HIPAA, the First Amendment to the United States Constitution, and the scope of the release they were ordered to sign be allowed to be raised for the first time on appeal?

C. RESTATEMENT OF THE CASE

(1) Introduction

In the present case, the Plaintiffs were involved in a traffic accident on I-5 in Cowlitz County, Washington. They assert and allege soft tissue injuries. (CP 3 and 6). They voluntarily filed a lawsuit in Cowlitz County superior court and sought compensation for their alleged personal injuries. As a result, the Plaintiffs plainly and unequivocally submitted themselves to Washington law and the full reach of discovery obligations that exist for any party litigant,

regardless of their citizenship. Plaintiffs were sent interrogatories and request for production of documents. Plaintiffs provided some, but not all, of their medical records. (CP 14-19). Despite repeated requests that these records be provided and supplemented, Plaintiffs steadfastly refused and stated that the only way further records can be provided is through using extra-territorial process through letters rogatory in Canada. Plaintiffs refused to sign releases for their medical records to allow those documents to be directly obtained from their providers.

D. SUMMARY OF ARGUMENT

The rules of discovery do not prioritize the manner in which medical records – or any documents for that matter – must be produced. Documents can be produced voluntarily even without a discovery request. A request for production of documents may be made, subpoenas may be used, releases may be signed or letters rogatory may be used. Any of these methods are permissible – and none are mandatory under our discovery rules. A court has the inherent power to manage and control discovery in a common sense fashion and not require undue expense or burden to any party. The signing of a release is inexpensive and simple particularly where, as here, Plaintiffs allege soft tissue injuries from a minor car accident. It violates the

right of no party particularly where, as here, Plaintiffs are suing for compensation for personal injury including medical expenses incurred to allow documents, including medical records, to be obtained by a release.

E. ARGUMENT

(1) Standard of Review

The scope of discovery is within the sound discretion of the trial court and its decisions will not be disturbed absent manifest abuse of that discretion. *Kreidler v. Cascade Nat'l Ins. Co.*, 179 Wn. App. 851, 321 P.3d 281 (Wash. Ct. App. 2014). *State v. Yates*, 111 Wn.2d 793, 797, 765 P.2d 291 (1988).

(2) The Trial Court Is Inherently Empowered to Manage Discovery in a Reasonable Fashion in View of the Needs of the Case

There is no question that the discovery requested – Plaintiffs' medical records – is material and relevant to this matter. A trial court must manage the discovery process in a fashion that promotes "full disclosure of relevant information while protecting against harmful side effects." *Kramer v. J.I. Case Mfg. Co.*, 62 Wn.App. 544, 556, 815, P.2d 798 (1991). CR 26(b)(1) provides a broad definition of relevancy. "Parties may obtain discovery regarding any matter, not privileged,

which is relevant to the subject matter involved in the pending action." Discovery is allowed for any matter that appears reasonably calculated to lead to the discovery of admissible evidence. CR 26(b)(1). See, e.g., *Barfield v. City of Seattle*, 100 Wn.2d 878, 676 P.2d 438 (1984); *Bushman v. New Holland Div. Of Sperry Rand Corp.*, 83 Wn.2d 429, 434, 518 P.2d 1078 (1974). CR 26(b)(1) also provides, in part, that the frequency or extent of use of the discovery methods shall be limited by the court if it determines that the discovery sought is unreasonably cumulative or duplicative, or is obtainable from another more convenient, less burdensome, or less expensive source, or "the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." Finally, under CR 26(c) the court, for good cause shown, may make any order justice requires in order to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 232, 654 P.2d 673, (1982) aff'd, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984).

The scope of discovery is broad. CR 26(b)(1) provides in relevant part as follows:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The standard of relevance for purposes of discovery is thus much wider than the admissibility standard for evidence applicable at trial. The fact that evidence sought would otherwise be inadmissible at trial is not a proper basis for refusing discovery, as long as the information which is the subject of discovery appears reasonably calculated to lead to discovery of admissible evidence. *Barfield v. City of Seattle*, 100 Wn.2d 878, 676 P.2d 439 (1984). Accordingly, absent privilege, the express limitation on discovery is the relevancy to a claim involved in the action, and the test applicable is whether the information sought is reasonably calculated to lead to discovery of

admissible evidence. *Lurris v. Bristol Laboratories, Inc.*, 89 Wn.2d 632, 574 P.2d 391 (1978).

The Superior Court correctly required Plaintiffs to sign releases to provide these records without the unnecessary and added expense of "internationalizing" local discovery efforts for Plaintiffs' soft tissue injury claims incurred in the state of Washington by requiring extraordinary discovery expense and efforts. The Courts that have considered this matter recognize the inherent power of the Court to require production of records by cost-effective and practical means. In general, a Court has inherent power to control discovery and fashion the relief required for any particular case. Fed. R. Civ. P. 34(a) permits document requests for documents in a party's possession, custody or control. Control has been broadly construed to mean the legal right, to obtain the documents requested upon demand even though the party presently may not have a copy of the document in its possession. *John B. v. Goetz*, 879 F. Supp. 2d 787, 2010 (M.D. Tenn. 2010). A court possesses inherent authority to manage litigation. The judiciary is free, within reason to exercise that inherent judicial power in flexible pragmatic ways. *Id.*

In *Smith v. Logansport Community School Corp.*, 139 F.R.D. 637, 24 Fed. R. Serv. 3d (Callaghan) 634 (N.D. Ind. 1991), held that ordering Plaintiff to sign releases for medical records was the most expeditious and practical way to handle the medical issues in that case, as follows:

> Ms. Smith did not object to Mr. Nolte's request for medical and psychiatric records, but instead qualified her answer by reserving to herself the determination of whether any such records in her possession would be relevant and thus subject to discovery. This response was improper. If plaintiff believed that the request was not reasonably calculated to lead to the discovery of admissible evidence, or was overbroad, she should have objected or sought a protective order. But having asserted no objection, she must produce all materials in her possession called for by the request. There is no middle ground entitling to her to produce some documents and withhold others, depending on her & pane determination of relevancy. *Id.* at 648.
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> There is no question that by asserting a claim for emotional distress Ms. Smith has placed her mental and emotional condition in issue and that the defendants are entitled to records concerning any counseling she may have received. *See Tramm v. Porter Memorial Hosp.*, 128 F.R.D. 666, 667-68 (N.D. Ind. 1989); *Doe v. Special*

> *Investigations Agency, Inc.*, No. 90-1762, slip op. (E.D. Pa. Aug. 29, 1991) ("the psychiatric and psychological records of the plaintiffs are certainly relevant to plaintiffs' claim for emotional distress"). In this case, as in others where the mental or physical condition of a party has been placed in issue, the practice of obtaining written consents for the release of records represents the least expensive and most efficient means of procuring information from medical or counseling providers. Court orders directing providers to produce their records often prove unsatisfactory since they require the party seeking production to apply to the court each time the identity of an individual provider is discovered. Subpoenas duces tecum, which must be accompanied by witness fees and records deposition notices, can prove costly and may result in additional delay. And orders directing the parties themselves to procure and produce their records give no assurance that all pertinent documents will be provided. ***The court will, accordingly, issue an order directing Ms. Smith to produce executed consents authorizing the release of her counseling records to Mr. Nolte's attorney.*** *See Brown v. Eli Lilly and Co.*, 131 F.R.D. 176, 178 (D. Neb. 1988); *Fleming v. Gardner*, 84 F.R.D. 217 (E.D. Tenn. 1978). *Id.* at 649. (emphasis supplied).

Here, just as in *Smith v. Logansport Community School Corp, supra*. Appellants should not be allowed to "pick and choose" what documents they decide to provide or deem "relevant" and an Order

granting production is appropriate. *See also, Brown v. Eli Lilly & Co.*, 131 F.R.D. 176, 1988 U.S. Dist. LEXIS 17402 (D. Neb. 1988), requiring the production of medical records by signed releases and the authorities cited therein.

In *Rojas v. Ryder Truck Rental*, Inc. 641 So. 2d 855 (1994) the Court recognized the reality of the court's inherent power to control and mange the production of relevant information, including medical records, just as in the present case. In that case, Massachusetts residents Carlos and Ana Rojas were injured in an automobile accident in Dade County, Florida. As a result of that accident, they filed suit against Ryder Truck Rental, Inc. (Ryder), seeking damages for injuries received from the accident. The Rojases were treated both before and after the accident at two Massachusetts medical facilities. During the course of discovery, Ryder attempted to obtain the Rojases' medical records from those facilities through subpoenas filed pursuant to Florida Rule of Civil Procedure 1.351 (production of documents without deposition from a non-party). The medical facilities refused to respond to Ryder's subpoenas requesting the records. Ryder failed to make any discovery request directly to Plaintiffs for production of medical records. Rojas argued that the Court should not sign an Order

requiring production of their medical records because Ryder had not made a direct request for these records to Rojas.

Ryder moved to compel the Rojases to sign written release and authorizations directing the facilities to release the medical records directly to Ryder's counsel. In granting the motion, the trial judge directed the medical facilities to furnish any and all documentation generated in connection with [the Rojases], including but not limited to: reports, charts, files, correspondence, notes, memoranda, radiology studies of any kind or nature, test findings, statements, billings, treatment of any kind or nature, including all psychological and psychiatric records for [the Rojases].

As the Florida Supreme Court stated in upholding the District Court's decision:

> Both the Rojases and the Academy of Florida Trial Lawyers, which filed an amicus brief in this action, urge this Court to quash the district court's decision in this case, raising the same issues the Rojases raised before the district court. The Rojases also contend that, if Ryder did not want to receive the records through a rule 1.350 request for production to the Rojases, Ryder should have sought the records via Massachusetts law once the medical facilities refused to honor the Florida subpoenas. We reject these contentions. As the district court noted in

this case:

> "The order entered here was well within the power and discretion of the trial court. A trial court possesses broad discretion in overseeing discovery, and protecting the parties that come before it. The order entered here accomplishes the discovery of the sought after medical records in the most expeditious and practical way possible, by having the records released directly to the Respondents. It burdens judicial resources the least, and does the most to ensure full disclosure so that defendants in personal injury litigation can fully and fairly litigate their liability. In fact, orders such as this are regularly entered by trial courts, and acquiesced to by plaintiffs. Furthermore, ordering the Petitioners to sign written authorizations for the release of medical records does not necessitate a violation of their right to protect unrelated, undiscoverable matters. A party, such as the Petitioners, who objects to the disclosure of parts of a medical record is free to request that the entire medical record be submitted to the trial court to review in camera. The trial court may then excise or redact the non-discoverable material, if any, prior to releasing the records to the party seeking them. The use of such an in camera procedure to facilitate discovery is common, and within the power of the trial court. 625 So. 2d at 107-08 (citations omitted). We agree." *Id.* at 857-58.

Here, unlike in Rojas, the Respondent attempted to obtain discovery information from Plaintiffs' counsel through interrogatories

and request for production of documents. That attempt to obtain information was unsuccessful. Allowing an Order from the Superior Court to obtain this information by release is appropriate given the needs of the present case, the nature of the claims asserted and the expense of an alternative process. There is also, no authority for Appellants to choose the exclusive means of document production.

Appellants cite cases in support of the proposition that they assert, which will establish that they cannot be compelled to sign a medical authorization. Each of the cases cited by Plaintiff are plainly distinguishable from the matter before the court.

In *Skinner v. Ryan*, 2010 U.S. Dist. LEXIS 122695, 2010 WL 4602935 (D. Ariz. Nov. 5, 2010), the Defendant sought to obtain a signed medical authorization from Plaintiff necessary to obtain medical records after the discovery deadline had expired and without certifying that Defendant had met and conferred with opposing counsel on this discovery issue. Also, the court found that in view of the expiration of the discovery deadline that the Defendant's attempt to characterize their request not as discovery, but merely seeking an order requiring the production of the records. The request was summarily denied and the court found the position that this was a discovery request beyond the

already extended discovery deadline as "disingenuous." Thus, *Skinner v. Ryan* does not decide the issue before this court, and Plaintiff refused to produce the requested records. The issue before the court was whether the medical authorization sought by Defendants was properly characterized as discovery. Defendants argued the request was not discovery but was instead a request to obtain medical records because Plaintiff put his health at issue. *Id.*

Clark v. Vega Wholesale, 181 F.R.D. 470 (1998) is also easily distinguishable from the case at hand. In *Clark* the issue before the court was whether the Plaintiff had "control" of her medical records. However, the court noted that "some courts order a party to sign a medical release, but those courts rely on the conclusion that a compelled medical release is the most expeditious, efficient or least expensive means of procuring information from medical providers." *Id.* at 472.

In *Clark*, the facts involved a sexual harassment case and both Plaintiff and Defendant resided in the same location. The court ruled against Defendant's motion to compel the medical records holding that the Defendant had access to the requested discovery through a request for production of documents – which had not been used. Thus, the

Defendant had failed to make any request for production of documents through FRCP 34, unlike in the present case.

In *Lopez v. Cardenas Markets, Inc., De Lourdes Lopez v. Cardenas Mkts., Inc.*, 2011 U.S. Dist. LEXIS 115245, 2011 WL 4738111 (D. Nev. 2011) one of the issues before the court was whether it was difficult, if not impossible, for Defendant to secure copies of Plaintiff's records with a Rule 45 subpoena because medical providers require a release signature from the person to whom the records pertain.

Lopez is easily distinguishable from the matter before the court. Once again, both Plaintiff and Defendant resided in the same State. In *Lopez*, the Defendant had the ability to subpoena Plaintiff's doctor if Plaintiff would not sign a medical authorization, though the court did agree that it would be more efficient and expeditious for a responding party to provide written authorization for release of relevant records. In this case, Respondent would need to cross international lines in order to obtain records. It is not simply a matter of subpoenaing records from a physician located in the same state that Plaintiff resides.

In *State ex rel. Jones v. Syler*, 936 S.W. 2d 805 (1997), the issue before the court was whether the Order compelling the Plaintiff to execute a medical authorization form was overly broad and exceeded

the scope of the issuing judge's authority. This issue has not been preserved for this appeal by Appellant and should not be considered. =

(3) Failure to Preserve Error

Plaintiffs now assert Constitutional Rights under Canadian law, "First Amendment" rights under the U.S. Constitution, rights under United States HIPAA law, and now even challenge the scope of the releases – all for the first time on appeal. These issues, raised for the first time on this appeal should not be considered. Wash. R. App. P. 2.5(a)(3). There is no basis for finding manifest error affecting a constitutional right in this matter, nor was any such claim raised. First, this is a personal injury claim and Plaintiffs have only chosen the records that they subjectively chose to provide. Plaintiffs cannot provide records of their choosing and then decide to hide behind an asserted constitutional right or vague and undisclosed "privacy interest" – which is still unidentified – in asserting they do not have to provide their records through releases. In fact, there is no "constitutional crisis" before this court. This is a personal injury claim dealing with the production of medical records with respect to soft tissue injury claims, the same as asserted in thousands of such cases filed yearly in the State of Washington. A court is entitled to manage the litigation in this case

by forming a practical, inexpensive basis by which to expeditiously exchange discovery.

Thus, the following are arguments that have not been preserved and are raised for the first time on appeal and should not be considered:

1. The Release is too broad in scope and time;
2. HIPAA
3. The Canadian Constitution
4. U.S. Const. Am. 1.

The only basis before the Court that was preserved for appeal is that Defendant should be required to seek these documents through Letters Rogatory and an assertion about their "privacy rights" – without further explanation. (CP 81-83).

F. CONCLUSION

The fact that there are many different ways that medical records might be collected such as through subpoena, letters rogatory, requests for production of documents, or by signed releases does not bind the parties or a court in choosing the means on how such documents should or must be produced. The court always has discretion in view of the needs of the case to order the appropriate measures given the needs of

the case in view of the efficiencies and practicalities required for discovery.

As a result, the decision of the trial court should be respectfully upheld in this appeal.

DATED this 17th day of February, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Douglas F. Foley, certify that I mailed, or caused to be mailed, a copy of the foregoing Respondent's Brief, postage prepaid, via U.S. Mail and by email, to the following counsel of record at the following address:

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DATED this 17th day of February, 2016.

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